No. 76-592

In the Supreme Court of the United States

OCTOBER TERM, 1976

KANSAS REFINED HELIUM COMPANY, A DIVISION OF ANGLE INDUSTRIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. During the course of a representation campaign, Kansas Refined Helium Company (KRH) discharged six employees because of their union activities. In November 1966, the Regional Director of the National Labor Relations Board issued an unfair labor practice complaint against KRH. The Regional Director also petitioned the District Court for the District of Kansas for an order, pursuant to Section 10(j) of the National Labor Relations Act, as added, 61 Stat. 149, 29 U.S.C. 160(j), directing KRH to reinstate the discharged employees pending a final determination by the Board of the underlying complaint. On April 5, 1967, the district court granted the Board's petition. The court of appeals affirmed on August 28, 1967. 382 F. 2d 655 (C.A. 10); see Pet. App. A18-A19.

On April 25, 1967, KRH offered to reinstate the employees in question "pending the final determination of this matter by the Board" (see Pet. App. A19). At the time the company extended these offers, two of the discharged employees (Johnson and Harris) had accepted new jobs and had moved several hundred miles from the company's Otis, Kansas, plant (Pet. App. A23-A24). In addition, both were earning in excess of what they would have earned had they remained with KRH (Pet. App. A13).[1] Another of the discharged employees (Bishop) had accepted a job 100 miles from the company's plant in Otis and was earning somewhat less than he would have earned with KRH (Pet. App. A15).

Johnson and Harris declined the offers, but Bishop initially accepted. In June 1967, the company wrote to Bishop a second time, suggesting that he reconsider his acceptance of "temporary reinstatement * * *under the temporary injunction" (Pet. App. A6-A7). The company's letter to Bishop emphasized that the company was attempting to dissolve the Section 10(j) reinstatement order because of the union's withdrawal of its representation petition. In response, Bishop withdrew his earlier acceptance and declined temporary reinstatement (*ibid.*).

On June 25, 1969, the Board found that the discharges of the six employees had violated Section 8(a)(3) of the Act, 61 Stat. 140, as amended,29 U.S.C. 158(a)(3), and ordered that they be reinstated with backpay. *George A. Angle, d/b/a Kansas Refined Helium Co.*, 176 N.L.R.B. 1032, enforced *sub nom. Oil, Chemical and Atomic Workers v. National Labor Relations Board*, 445 F. 2d 237 (C.A. D.C.), certiorari denied, *sub nom. Angle, d/b/a*

[1]In subsequent periods, both Johnson and Harris earned less than they would have earned at KRH (Pet. App. A13).

Kansas Refined Helium Co. v. *National Labor Relations Board*, 404 U.S. 1039. Johnson, Harris and Bishop subsequently declined the company's offers of permanent reinstatement (Pet. App. A20).

The Board, by a vote of 3 to 2, concluded that the company's offers of temporary reinstatement had been sufficient to impose a duty upon the discharged employees either to accept the offers or be guilty of a willful loss of interim earnings. Accordingly, the Board tolled the backpay of Johnson, Harris and Bishop for the period encompassed by the offers (Pet. App. A20-A21).

2. The court of appeals reversed and remanded, holding that in the circumstances of this case the employees in question had acted reasonably in rejecting the company's offers of temporary reinstatement. As to Johnson and Harris, the court stated (Pet. App. A14-A15; original emphasis):

> Aside from the *temporary* character of the offer as opposed to their present permanent employment, and the fact that the offer paid *less* than their present employment and involved tension-filled working conditions, an employee is not required to accept employment at a great distance from his home. * * * Acceptance of [the company's] offer would involve a relocation of several hundred miles—the second such uprooting in a period of eight months.

As to Bishop, the court observed (Pet. App. A16-A17; original emphasis):

> [H]e promptly sought and obtained interim employment. When [the company's] offer was extended, Bishop had to choose between a lower paying *permanent* job and a higher paying job with [the company] which was so temporary in character that, if [the

company] succeeded in vacating the Section 10(j) injunction, the job might have been gone by the time Bishop moved back to Otis. Moreover, acceptance of [the company's] interim offer would have entailed a one hundred mile relocation, the second such move within eight months. If an employee does not incur a willful loss of earnings by refusing to move one hundred miles to accept an offer of permanent employment, *Florence Printing Co.* v. [*National Labor Relations Board*, 376 F. 2d 216 (C.A. 4)], we cannot understand how Bishop could be found to have incurred a willful loss of earnings by refusing to leave his permanent job and move one hundred miles for the second time to accept temporary employment. We believe that under prior Board decisions it cannot be thought that Bishop acted unreasonably in choosing to remain in Wichita rather than accepting [the company's] offer. We therefore hold that Bishop did not incur a willful loss of earnings.

3. The question presented in this case is whether employees Johnson, Harris and Bishop incurred a willful loss of earnings in declining to accept the company's offers of re-employment, which were made "pending the final determination of this matter by the Board." The court of appeals found that, in the circumstances of this case, the employees reasonably rejected the company's offers of temporary reinstatement. While the Board believes that the court should have accepted the Board's contrary conclusion, the Board decided not to petition for certiorari since resolution of the question presented depends upon the particular facts of this case. Accordingly, it is not a question warranting this Court's attention. See *Universal Camera Corp.* v. *National Labor Relations Board*,

340 U.S. 474, 480. The company's petition stands on no better footing. It therefore should be denied.

Respectfully submitted.

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JANUARY 1977.